Supreme Court, U.S.
FILED
MAR 26 1986
JOSEPH F. SPANIOL, JR.
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(3)

No. 85-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

Petitioners,

v.

PACCAR, INC., a Delaware corporation,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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APPENDIX TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 26, 1986

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corp.,

Plaintiffs,

vs. Case No. 79-598-Orl-Civ-Y

PACCAR, INC., a Delaware corporation,

Defendant.

_____/

ORDER

This cause came on for hearing on December 3, 1982 on defendant's motion for judgment notwithstanding verdict or alternative motion for new trial. For the reasons stated from the bench at the conclusion of the aforesaid hearing the motion for judgment notwithstanding verdict should be denied, but the alternative motion for new trial should be granted. It is this Court's opinion that the admission of Dr. Westbrook's testimony (the expert who testified on behalf of plaintiff) as support for both liability and damages was in error in that it was completely speculative. Without such evidence the plaintiff could not have prevailed. Accordingly, it is

ORDERED that the motion for judgment notwithstanding verdict be and is hereby DENIED; and it is further

ORDERED that the alternative motion for new trial be and is hereby GRANTED.

SO ORDERED in Chambers at Orlando, Florida, this 23rd day of December, 1982.

/s/ George C. Young
SENIOR UNITED STATES
DISTRICT JUDGE

Copies to:

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FILED
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CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT OF FLORIDA, INC.,

Plaintiffs,

—vs—

PACCAR, INC.,

Defendant.

No. 79-598-Orl-Civ-Y

Transcript of excerpt of proceedings held on Friday, December 3, 1982, commencing at 1:00 o'clock p.m., in Courtroom 3, United States Courthouse and Federal Building, 80 North Hughey, Orlando, Florida, before the Honorable George C. Young, Senior Judge.

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* * * * * *

PROCEEDINGS

THE COURT: Well, as Mr. Webster has currently pointed out every case must stand on its own bottom. The facts of this case are that Mr. Deas bought out the Peterbilt dealership and the most it was ever capitalized for was some $9,000 plus. When he bought the dealership it sold not only Peterbilt trucks but another brand of trucks as well and operated under a different name.

He decided to sell only Peterbilt trucks, although he was never required to confine himself to the one brand and the evidence is that other Peterbilt dealers throughout the country do on occasion sell other brands.

With permission of Peterbilt Motor Company, a subsidiary of the Defendant, he changed the name of the dealership to Peterbilt of Florida. Thereafter he sold only Peterbilt trucks.

His relations with the manufacturer started out poorly in that when he acquired the dealership the contract was on a month-to-month basis, could be terminated by either side by 30 days notice.

Shortly after he acquired the dealership the manufacturer wanted a new contract which provided among other provisions for a three-year term. He objected to the three-year term and signed the contract with an accompanying letter of protest which presumably did not endure to the best of relations with the other contracting party.

Subsequently this operation left much to be desired, as evidenced by a declining net worth which soon became a negative net worth. His accountant, according to the annual reports that are in evidence, kept criticizing these pro-

cedures and operations and urging him to take corrective measures which were not taken and to increase his operating capital by borrowing before interest rates went too high, a prophecy which subsequent events have proved to be correct.

Further, Mr. Deas through Peterbilt of Florida gave numerous bad checks amounting to thousands of dollars, not only to various creditors in the community but even to Peterbilt Motor Company itself. His credit was such that it required Peterbilt Motor Company to put him on a COD status for the delivery of parts.

Furthermore, his financial condition was such that his floor planning financing source, associates, put certain requirements as did Peterbilt Motor Company in connection with each truck being assured that financing was available for it before it was delivered.

As pointed out by counsel for Plaintiff, Mr. Rohr, when he became general manager he expressed a desire to have a different dealer. Much is made of the fact that Rohr had an interoffice communication asking his subordinates to prepare a file to gather information to support a subsequent termination of the relationship between Peterbilt Motor Company and Peterbilt of Florida.

This standing alone just would not justify liability and damages under either of the Florida or Federal dealers' acts. It is perfectly obvious that with the existence of these acts that if a dealer is conducting himself in such a way that a manufacturer desires to terminate the relationship, then an appropriate file needs to be accumulated.

If the taking of steps to prepare information to support a justifiable termination is in itself a violation of either or both of the acts, then it would mean that the acts make it

impossible for any termination to ever be made regardless of the sufficiency of the ground for such termination.

Now, the contract Peterbilt of Florida had with Peterbilt Motor Company provided that an additional facility would be provided by the dealer when required and there was no provision in the contract or in any other contract in this case requiring the Defendant to provide financing for such expansion.

In his argument counsel for the Plaintiff has stated the contention that the Plaintiff, Paccar, was responsibile for the poor financial condition of Peterbilt of Florida because, one, it required the expansion from Orlando to Jacksonville, Tampa and Fort Lauderdale; secondly, that it discriminated deliveries necessary to financially support such expansion; and thirdly, that Paccar failed to provide the necessary finances to pay for such expansion.

As I have pointed out, there was no requirement for such financial support. As a matter of fact, Mr. Deas himself in testifying in connection with the expansion urged upon him by representatives of Paccar stated, and I quote, they seemed to indicate that they could help get financing.

At one point during the efforts of Deas to get Peterbilt Motor Company to provide financing and an offer was made for a loan which was never consummated because Deas did not agree to all of the proposed terms for the loan, including a requirement that he and his family not draw down more than $75,000 annually during the term of the loan.

Now, as to the discrimination in delivery both as to the number of trucks and as to the time, the sole evidence that was offered on this point was that of Dr. Westbrook, the Plaintiffs' expert. Dr. Robert Westbrook's testimony was admitted over objection by defense counsel and both as to

his conclusions of discrimination and damages. It was extraordinary to say the least.

It is my opinion there is no proper factual basis in regard to the four companies that he selected as being picked out at random. Of all of the numerous dealers instead of picking them at random he just picked four that he suspected got favor treatment which might show that those four got favor treatment but by comparing Peterbilt of Florida to them would not necessarily come up with the — could not come up with the conclusion that Peterbilt of Florida was discriminated against as to the average dealer but only that it was discriminated against as to a favored dealer. One of these dealers was not in the southeast section.

On this point both the evidence of the Plaintiff and the evidence of the Defendant were, I think — was considerably deficient. The testimony of Neville was because of his connection with Paccar in the past and an attitude such that it could have resulted reasonably. It was never shown by either side on this discrimination point of how many trucks were being produced and how many actually were available to come to Peterbilt of Florida and whether Peterbilt Motor Company was deliberately allocating 125 trucks when they could have allocated 250, for example. The Plaintiff didn't show that and the Defendant didn't show that.

There was evidence that there was a strike at one time and then there was talk, well, that that would have affected the delivery, but I saw no concrete evidence as to what effect the strike had on the deliveries and on the quotas.

Now, we had — or rather on sales allocations, truck allocations there is two different situations during the

insufficient amount to pay the debts that he then owed which included mortgages and back taxes to the State of Florida so that there would not have been any more money to put into the operation of his business in Orlando. It was a distortion of the evidence to come up with any other contention. In addition to giving bad checks and being in a negative net worth and losing money he was also failing to pay taxes.

There was no evidence as to what the market was in the Fort Lauderdale, Miami area. Again the record was deficient both by the Plaintiff and the Defendant in this respect as to the effect of the cancel determination of the — that portion of the estate as to what profits were lost or could have been made there.

The contention of Dr. Westbrook that sales will continue to spiral without any increase in costs and without taking into consideration any inflation was extraordinary.

I have been tempted to grant a judgment N.O.V., but after all of the circumstances I am not going to do so and we will grant a new trial.

MR. DeVAULT: Your Honor, if that is the Court's ruling, we would respectfully request that Your Honor consider reassigning the case to another judge for retrial.

THE COURT: I have no intention of retrying it.

MR. DeVAULT: Thanks.

THE COURT: I don't retry cases.

(Whereupon, the hearing concluded at 2:40 o'clock p.m.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS

Plaintiff,

vs. Case No. 79-598-Orl-Civ-Y

PACCAR, INC., et al.,

Defendants.

_____/

ORDER

This cause came on for trial on September 20, 1982, with two motions outstanding. Defense counsel objected to the introduction of parol evidence as to the January 31, 1972, December 15, 1975 and January 11, 1979 contracts between Peterbilt of Florida and Paccar. Plaintiff had moved in limine to prohibit evidence of other reasons for non-renewal of plaintiff's franchise other than the reasons set forth in defendant's February 1, 1979 letter. Upon consideration and in accordance with the Court's rulings from the bench, it is

ORDERED that defendant's motion to exclude parol evidence as to the January 31, 1972, December 15, 1975 and January 11, 1979 contracts between Peterbilt of Florida and Paccar be and is hereby granted as to Counts 1 and 2, but denied as to the fraud count. It is further

ORDERED that plaintiff's motion in limine to prohibit evidence of other reasons for non-renewal of plaintiff's franchise other than the reasons set forth in defendant's February 1, 1979 letter be and is hereby denied as to any

reasons known to the defendant prior to February 1, 1979 and upon which the defendant relied in part on its decision of non-renewal.

SO ORDERED in Chambers at Orlando, Florida, this 21st day of September, 1982.

/s/ George C. Young
SENIOR UNITED STATES
DISTRICT JUDGE

Copies hand delivered to:
John DeVault, Esquire
Eli Subin, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 79-598-Orl-Civ-Y

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs.

PACCAR, INC., a Delaware corporation,

Defendant.

MOTION FOR RELIEF FROM ORDER

Plaintiffs, pursuant to Rule 60(b), Federal Rules of Civil Procedure, move this Court to correct this Court's Order of December 23, 1982, by entering a judgment notwithstanding the verdict for defendant, upon the following grounds:

1. The reasoning and grounds upon which this Court based its Order are inconsistent with the denial of the motion for judgment notwithstanding the verdict.

2. Plaintiffs are satisfied with the proof presented at the first trial and consider a new trial unnecessary, undesirable and, because of their financial condition, financially impossible. If plaintiffs were in a financial position to undertake a retrial of the case, plaintiffs would present the same evidence presented at the first trial in support of their claims, including the expert testimony of Dr. Westbrook, which this Court has held to be speculative and insufficient to support the jury's verdict.

3. The Court's Order presently is not subject to appeal.

Accordingly, because the parties and the Court would be best served by an immediate appellate ruling on the legal sufficiency of the evidence presented to support the jury's verdict in favor of plaintiffs, plaintiffs respectfully urge the Court to correct the Order and enter a judgment notwithstanding the verdict upon defendant's prior motion, in order to permit an immediate appeal and final disposition of this case.

BEDELL, BEDELL, DITTMAR & ZEHMER
Professional Association

By: /s/ John A. DeVault, III
John A. DeVault, III

By: /s/ Peter D. Webster
Peter D. Webster
1500 Barnett Bank Building
Jacksonville, Florida 32202
(904) 353-0211

Attorneys for Plaintiffs

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Eli H. Subin, Esquire, Post Office Box 285, Orlando, Florida 32802, by mail, this 28th day of December, 1982.

/s/ John A. DeVault
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 79-598-Orl-Civ-Y

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs.

PACCAR, INC., a Delaware corporation,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION FOR RELIEF FROM ORDER

Plaintiffs have moved, pursuant to the provisions of Rule 60(b), Fed.R.Civ.P., to have this Court "correct" its Order entered on December 23, 1982, by entering a judgment notwithstanding the verdict for defendant, as requested by defendant after entry of judgment in favor of plaintiffs. This request attempts to follow a procedure approved in similar circumstances by the Sixth Circuit in *National Polymer Products, Inc.* v. *Borg-Warner Corp.*, 660 F.2d 171 (6th Cir. 1981).

In *National Polymer Products,* after a seven-week trial in a products liability case, a jury verdict in favor of Polymer was returned, assessing damages of almost $1 million. Defendant Borg-Warner filed a motion for judgment notwithstanding the verdict and, in the alternative, a motion for new trial. Considering "the motion for JNOV

to present a 'close question' " (660 F.2d at 172-73), the district court denied that motion, but granted the motion for new trial. Satisfied with the evidence presented at the first trial, and left with a bankrupt client and without a final decision which could be appealed, Polymer's lawyers filed a motion under Rule 60 to "correct" the district court's order by entry of a judgment notwithstanding the verdict, as requested by the defendant. The district court granted the motion. On appeal from the judgment notwithstanding the verdict, the court of appeals rejected defendant's motion to dismiss the appeal, holding that Polymer had not "consented to the entry of a final judgment against it" (660 F.2d at 176) but, rather, had simply attempted to "align the court's ultimate disposition of the case with the reasoning in its opinion" (660 F.2d at 177).

> "The dismissal, though perhaps indirectly and in a very loose sense solicited by National Polymer, was not voluntary. It was a calculated reaction to the inconsistency between the court's ruling and reasoning on the substantive issues.
>
> "The Supreme Court has considered and rejected Borg-Warner's argument in a related context. In *Thomsen* v. *Cayser,* 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597 (1917), the losing party persuaded the appellate court to dismiss the case rather than remand it for a new trial. . . . 'The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.' 243 U.S. at 83, 37 S.Ct. at 358.
>
> "Here, the lower court order granting a new trial was interlocutory and unappealable. Na-

> tional Polymer persuaded the trial court to change its verdict to reflect its reasoning. That alteration produced a final judgment, a dismissal, allowing this appeal to be maintained. *Cf. Raceway Properties, Inc.* v. *Emprise Corp.*, 613 F.2d 656 (6th Cir. 1980) (plaintiffs solicited formal dismissal of their civil anti-trust suit after an adverse trial court decision on the relevant market which rendered them unable to proceed; appeal allowed since request for dismissal was designed only to expedite review of the order which, in effect dismissed the lawsuit)." 660 F.2d at 177.

The appellate court then proceeded to consider on its merits the propriety of entry of the judgment notwithstanding the verdict.

In the instant case, this Court based its Order granting a new trial on the ground that the admission of the testimony of plaintiffs' expert, Dr. Westbrook, "was in error in that it was completely speculative" and that "[w]ithout such evidence the plaintiff could not have prevailed."

Plaintiffs respectfully contend that Dr. Westbrook's testimony was not speculative in nature, that it was properly admitted at trial, and that it was legally sufficient to support the jury's verdict. If, however, this Court has correctly concluded that Dr. Westbrook's testimony should not have been admitted and that plaintiffs could not have prevailed without such testimony, then there was insufficient evidence to present the case to the jury and the defendant's motions for directed verdict or for judgment notwithstanding the verdict should have been granted. *See, e.g., R.S.E., Inc.* v. *Pennsy Supply, Inc.*, 523 F.Supp. 954 (M.D.Pa. 1981); *ILC Peripherals Leasing Corp.* v. *International Business Machines Corp.*, 458 F.Supp. 423,

434-36 (N.D.Cal. 1978), *aff'd,* 636 F.2d 1188 (9th Cir. 1980), *cert. denied,* 452 U.S. 972 (1981). *Cf., Boeing Co.* v. *Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc); *Copper Liquor, Inc.* v. *Adolph Coors Co.,* 624 F.2d 575, 580 (5th Cir. 1980), *citing Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946).

From the evidence adduced at trial, the Court is aware of plaintiffs' current financial condition, and from the affidavit submitted in support of plaintiffs' motion for award of attorneys' fees, the Court is familiar with the expenses paid and time devoted to date in this matter by plaintiffs and their attorneys. In their motion, plaintiffs have represented to this Court that they are satisfied with the proof presented at the initial trial, and that if required to retry the case they would present the same evidence, including that of their expert witness, Dr. Westbrook, thus requiring this Court, based upon its determination that the plaintiffs' proof was legally insufficient, to grant a directed verdict. Plaintiffs' motion seeks to avoid such an unnecessary expenditure of additional time and money and to permit a prompt and final disposition of this case.

Accordingly, this Court should enter a judgment notwithstanding the verdict, pursuant to Rule 60(b), and in accordance with defendant's prior motion.

Respectfully submitted,

BEDELL, BEDELL, DITTMAR & ZEHMER
Professional Association

By: /s/ John A. DeVault, III
John A. DeVault, III

By: /s/ Peter D. Webster
Peter D. Webster
1500 Barnett Bank Building
Jacksonville, Florida 32202
(904) 353-0211

Attorneys for Plaintiffs

Certificate of Service

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Eli H. Subin, Esquire, Post Office Box 285, Orlando, Florida 32802, by mail, this 28th day of December, 1982.

/s/ John A. DeVault
Attorney

[Transcript of Hearing on Motion for Relief from Order (Rule 60(b) Motion)]

PROCEEDINGS

THE COURT: All right. We're here in the case of Deas versus Paccar, 79-598-Orl-Civ.

And Mr. DeVault, you and Mr. Webster are here representing the Plaintiff?

MR. DeVAULT: Yes, Your Honor.

THE COURT: Mr. Subin, you're representing the Defendant?

MR. SUBIN: Yes, Your Honor.

THE COURT: And we're here on an unusual Motion; a Motion filed by Mr. DeVault and Mr. Webster asking the Court to grant a Judgment NOV; is that right?

MR. DeVAULT: That's correct, Your Honor.

THE COURT: All right. Well, I thought I ought to hear what you had to say in addition to, either in addition to or to expand, if you wanted to, or to stress whatever you wanted to in connection with your Brief, which, of course, I read.

MR. DeVAULT: Yes, Your Honor.

May I state it from here, Your Honor?

THE COURT: Wherever you please.

MR. DeVAULT: Thank you.

John DeVault on behalf of the Plaintiffs.

Your Honor, it is a little bit unusual. In fact, we found only one case, which I cited in the Brief, which I know Your Honor is familiar with.

THE COURT: What is that; the 9th Circuit?

MR. DeVAULT: The 6th Circuit.

THE COURT: The 6th Circuit.

MR. DeVAULT: The 6th Circuit with the *National Palimer* (ph) [sic] case in which this procedure has been utilized. And I thought that case particularly apt not only because it utilized Rule 60B on that Procedure, but also because what happened below in the trial seemed very similar to this.

I apologize for my voice, Your Honor. I've got a cold.

In that case, as in this one, the substantial Jury verdict was entered on behalf of Plaintiff. And in that case, as in this one, the Jury answered Interrogatories directed to it by the Court; found in favor of the Plaintiffs in all respects.

It was apparent from the trial Judge's Order in that case that he aggrandized to a considerable extent as to the two motions that were presented subsequent to trial; that is, the Judgment NOV presented by the Plaintiff and the Alternative Motion for a New Trial.

In fact, in his Order he said that he was quite tempted to grant the Judgment NOV, but decided to grant the New Trial Motion and denied the Judgment NOV.

Implicit, I think, in that District Judge's Order was the fact that because it presented such a close question, he wanted to give the Plaintiff the opportunity at another trial to present additional evidence at a new trial. Likewise, in the instant case, Your Honor, there, of course, was a lengthy trial presenting some difficult questions of law. In fact, it proceeded over a period of several weeks. There were considerable factual disputes in the case as well as legal disputes. It was presented to the Jury and argued completely to the Jury and the Jury returned the verdict. And the Defendant likewise presented the Judgment NOV. The Judge granted the Alternative Motion for New Trial.

Following the hearing that we had in this case in December, I think it was December 3rd, in Your Honor's Hearing Room, the Court set forth its reasons. And I won't go into those as to why the Court was taking the action it was. And you indicated at Page 13 of this transcript that you'd been tempted to grant a Judgment NOV, but after all the circumstances you said, "I'm not going to do so and will grant a new trial."

We, like the Plaintiffs in *National Palimer [sic]* case, come to the Court and say to the Court that if the reasoning of the Court is set out at the hearing and in the Court's Order of December 23rd be correct – And we don't concede that it is, Your Honor. We feel we presented evidence sufficient to make the Jury question and that the evidence supports the Jury verdict. But we're not here to argue that point, of course, and we respect the Court's ruling on that.

And I want to make clear to the court and Mr. Subin it's not my purpose to argue with the Court's ruling.

THE COURT: I understand.

MR. DeVAULT: I simply say that if the Court is correct and if the liability and the damage testimony presented by our expert witness, upon which we concedingly base much of our case, should not have been presented to the Jury, then we didn't have a case. We didn't have a case and the Court should have entered a Directed Verdict either at the close of our case, at the close of all the evidence or now on a Judgment notwithstanding the verdict.

Now, we ask that because we think it's consistent. It's wholly consistent with the Court's ruling. We also ask it as a matter of fairness and a matter of judicial policy.

We have represented in our Motion that we're satisfied with the Brief we've presented. That because of the circumstances of these Plaintiffs, we're unable to go forward

with the expense of a new trial. We further stated that if we were to go on with a new trial, we would present the same testimony upon which we relied at the initial case and including that of Dr. Westbrook, which if this Court's ruling was correct and this Court or any other Court is consistent with the Court's ruling, would be required to grant a directed verdict.

We submit then, Your Honor, that in the proper administration of justice, it is far better for this Court and for the parties to have this matter finally and conclusively as determined by the Court of Appeals on now a full Record, after a full hearing, argument and a Jury verdict.

THE COURT: Well, let me ask you several questions, not intended to indicate any opinion –

MR. DeVAULT: Yes, sir.

THE COURT: – because I'm approaching this with an open mind.

MR. DeVAULT: Sure.

THE COURT: It is your belief that in this circuit that if I were to grant a Judgment NOV at your request, that would not foreclose you from saying that it shouldn't have been granted?

MR. DeVAULT: Your Honor, I have to admit to the Court in all candor, and I've told my client, that so far as we're able to determine, the 6th Circuit case is the only one that gives us guidance. There is no other decision like this in the 11th Circuit or the 5th Circuit. That case, I believe, presents the analysis that the 11th Circuit would follow. That is, we're not inviting a Judgment NOV: we're simply saying if the Court's Ruling, and if the Court's Order and the Court's Oral Ruling is to be consistent with the whole then the Court ought to grant the Judgment NOV, and we

would hope that the 11th Circuit will let us take that appeal.

THE COURT: Now, the next thing is that for me to grant a Judgment NOV is, in effect, finding for the Defendant.

MR. DeVAULT: Yes, sir.

THE COURT: Now, I intended, if I did not do so, to indicate in my Ruling that I can see some merit into some portion or possible merit to some portions of the Complaint. And to foreclose you by Judgment NOV is somewhat harsh and more harsh than I intended. That's the problem as I see it, Mr. DeVault.

MR. DeVAULT: Well, perhaps, your Honor, the answer to that is if the Court were to grant the Judgment NOV and alternatively the new trial, the Court of Appeals, of course, would have both rulings before it. The Court of Appeal then has the choice to either reinstate the verdict, if the Court determined that we were correct. It would have a choice to affirm the Judgment NOV and say, "There's no point to your case. You had your chance and you didn't present it," or it would have a third alternative, which, incidentally, the 6th Circuit ultimately chose *National Palimer [sic]* and gave –

THE COURT: Gave them a new trial.

MR. DeVAULT: – and gave them a new trial. And so the Judge was correct in the first instance, so it wouldn't foreclose that.

If this were like the State Court where we can take the appeal for the new trial, we wouldn't have the problem because we don't. I think it would still permit, would not be as harsh as it might seem to cause you to grant both.

THE COURT: You see, and I'm speaking from memory now, in this case the evidence that was presented and, I believe I touched on this in my ruling, there is a big question as to this Fort Lauderdale-Miami territory and the effect that it had, what could be done and what, for example, whether or not it could be from Orlando or not or what effect losing that territory they had, what potential there was there. And I felt that the Record on both sides was greatly devoid of evidence that would be developed. I don't know. I have no idea what the evidence would show if it were developed after what the market was in that area. I can't, it just seemed to me that it should have been. And for there to be a verdict, such as we've returned in this case – and I just use that as one example, there are others to go into – that's why I felt it would be fair to both sides to have a new trial and have an opportunity for more evidence to be advised. It's hard for me to believe that there's not more evidence available on both sides on issues that were, in fact, submitted to the Jury without the Jury having the evidence to know what effect, for example, the territory of Miami, how it was was affecting Paccar. It seemed to me there also should be a, discussed some evidence on that. And what they come forth with, I don't know.

There was, the evidence seemed lacking on both sides as to the production of and the causes of quotas that were imposed in the years that were particularly complained of, things of that sort that were left devoid for a Jury to have to speculate.

Now, that's the things that bothers me along with many other points. But I just want to point out that granting a Judgment NOV would, if sustained, would completely cut out the Plaintiff when the Plaintiff may have, if the evidence were fully developed, might have a good claim.

MR. DeVAULT: Well, I recognize that troubles the Court, Your Honor. I recognized that during the trial and the argument and the motions. And first, we've tried to relieve that burden from the Court by the representation we made in the Motion. And we didn't make it lightly. We made it with some considerable consideration, so we relieved from the Courts that, we tried to relieve that burden. And, secondly, as Your Honor said in your Order of the 23rd, referring to Dr. Westbrook's testimony as to liability and damage, without putting that in evidence the Plaintiff could not have prevailed.

Now, we have the burden, obviously, not the Defendant. And if that's the Court's view, without that we couldn't have prevailed. Then, technically, and as a matter of law as to the Judgment, the Court ought to enter the Judgment NOV. But recognizing the problems, we've tried to overcome those problems by telling the Court this is all we can do, Judge, we're satisfied with the proof, we're satisfied with the verdict, and if the Court's right, we're out of Court.

THE COURT: All right.

MR. DeVAULT: And as I think you said one time during trial, it would go up one way or the other and the Court will decide. And that's what we're seeking.

THE COURT: All right. Now, Mr. Subin, I want to ask you this question: Since you moved for a Judgment NOV, presumably you felt it had merit.

MR. SUBIN: I do.

THE COURT: So now, why do you object to the Court granting the request of Mr. DeVault? That was one of the main reasons I wanted to have this hearing today, so that I could ask you eyeball to eyeball why you object if you get

what you want or presumably satisfied that you could prevail on appeal?

MR. SUBIN: The answer to your question is when the matter was first presented, I understood it to be a request with the Court that Judgment NOV be granted period, not with an alternative Order for a new trial.

In the Court's Order from the bench on December 3rd granting a new trial, listed as grounds, enunciated as grounds a number of judicial acts, which the Court indicated were erroneous.

Included among them was the reference for the failure to charge the Jury under the claim as to the Florida's Dealer's Act in a manner consistent with *International Harvester Company versus Calvin.*

Inasmuch as the claim was the heart of this suit, it appeared to me that the Jury, the Judge was agreeing the Jury wasn't properly charged. If the Jury wasn't properly charged, he would have been entitled to a new trial.

This matter came to me as novelty as it did to the Court. And I congratulate Mr. DeVault on his scholarship having been presented with the argument of why you should just have a Judgment NOV. I rejected that because really we didn't have a fair trial. There were other things that I think were erroneous. However, this is not to say that today, having had the benefit of memoranda back and forth, a little reading and the benefit of the discussion today, that we couldn't, between counsel and the Court, find a solution that is lawful and does substantial justice.

We know in the *National Palimer [sic]* case, Judge Sarducci (ph) and the Court of Appeals' decision said, "The Judgment NOV won't be affirmed, but the alternative order for the new trial would be."

We cited on a number of occasions *Cecil Corley Motor Corporation versus General Motors,* a decision of a United States District Court involving almost identically the same claims as were involved in our case.

The District Judge wrote an exhaustive opinion in that case focusing on all of the same issues we had. And I note for the purposes of this discussion today that in that case the District Judge granted a Judgment NOV and alternatively a new trial in a manner consistent with Rule 50, that's Rule 50 C, something that could be done.

I think that there's only one problem that I have today with the posture in which we find ourselves by reason of the subject motions for relief. It is that, I'm beginning to read some ambiguity and confusion into the Record by virtue of Mr. DeVault's papers. His papers are saying that this Court granted the new trial solely on considerations of the evidence; considerations of where the great weight of the evidence was. And I would like to argue that that's just not so, because we all have the transcript of the Ruling from the bench and there were substantial legal matters, judicial acts involved. And I'm very concerned about that because this will go up on appeal – pardon me Judge?

THE COURT: Well, just a minute now. That's not in answer to the question I asked you.

In the first place, I think the Record is clear that I granted a motion for a new trial for a number of reasons –

MR. SUBIN: Yes.

THE COURT: – which are in the Record, which part of which we have stated here today.

Now, my question is, again I repeat, if you want a motion, or you want a Judgment NOV, why do you oppose

Mr. DeVault's request that I enter one with the alternative granting of a Motion for a New Trial?

MR. SUBIN: With the alternatively of the new trial I will not oppose because this was not something made perfectly clear before.

THE COURT: That's what he sent; isn't that correct, Mr. DeVault?

MR. DeVAULT: Yes, that's correct.

THE COURT: You're not asking — I withdrew my Ruling on that.

MR. DeVAULT: No, Your Honor.

THE COURT: So everything is in accord in this case that was filed in 1979.

MR. SUBIN: I would add —

MR. DeVAULT: I mean, that might be correct, Your Honor.

MR. SUBIN: I would add that we, I made an error in my papers filed on this Motion when I indicated it was my opinion that the Rule 60 B Motion was the proper procedure. It is not.

In the 5th Circuit and elsewhere, it's recognized that everyone knows that the Order to grant a new trial is an interlockatory [sic] one. And the Court has discretion to treat his interlockatory [sic] orders any way it wants at anytime; however, a 60 B Motion is not proper. So that on the basis of the 5th Circuit's decisions, which I have, not necessarily important to cite, this Court would have to treat, I submit, this Motion not as a Rule 60 B Motion as may have been the case in *National Palimer,*[sic] I'm not sure it is really, but would have to treat it simply as an application for a modification of the interlockatory [sic] order.

For authority I have *Bonaire Hotel versus Time, Inc.*, reported at 426 F.2d, beginning at Page 858, a decision on the 5th Circuit and a number of other cases.

I think it may be a small procedural thing. So I apologize for what I consider to be an erroneous statement. I do not think Rule 60 B is the appropriate procedural vehicle for this Court to treat the Motion.

The other point, and I'll sit down, simply that I'm most anxious, and the Court has to reaffirm the Ruling from the bench where it has been stated in the Record of December 3rd that there was, in the Court's opinion, unlawful evidence that went to the Jury. And that when speaking of Dr. Westbrook's testimony, it was, the Court was referring to it not for its weight, but that it was inadmissible. And on that basis, I would agree with Mr. DeVault. But as the Court noted on December the 3rd, "But for that testimony in evidence, there would have been no recovery."

So if you would withdraw that, if one would consider it withdrawn because it was not admissible, then a Judgment Notwithstanding the Verdict would necessarily have to have been granted. That would have been consistent.

THE COURT: All right. Well, if 60 B in your opinion is not appropriate vehicle, what do you think is?

MR. SUBIN: I've read from the cases that District Judges have the discretion to treat their interlockatory [sic] orders at anytime and in any manner they see fit before they become final. It is so stated in the *Bonaire Hotel* case at Page 862, which I've cited. And there's a pretty good paragraph in Warren's Federal Practice citing a number of decisions on the same point.

THE COURT: Well, if you're in agreement with Mr. DeVault that it would expedite matters and perhaps save a

new trial if he prevails, why not then for me to go ahead and grant his request?

MR. SUBIN: Well, it may or may not save anything. It may result in our incurring the expense of an appeal only to find that we're back for a new trial anyhow.

THE COURT: That's the only extra expense that would be involved.

MR. SUBIN: And that we are entitled to a fair trial no matter what. That is the extra expense.

THE COURT: Right.

MR. SUBIN: And upon the motion of a party that says they don't have any more money, I think one should take that with a grain of salt when one considers the expense of putting together a Record based upon what was almost a 5-week trial. We're going to be put through a substantial expense.

But as I say, in answer to your question, if we can have an alternative order for a new trial, as you have indicated you would not withdraw your Order, fine.

THE COURT: Well, if the Record is clear that I'm granting the Judgment NOV solely to permit an appeal and on the basis that the Defendant moved for it and the Plaintiff requests that it be answered for that purpose –

MR. SUBIN: Well.

THE COURT: – without withdrawing its objections to it, then if I am satisfied that it is proper for me to do it, I would do it.

Now, I'm going to reread this *Palimer* [sic] case. I'm not anxious to be criticized by the Court of Appeals for answering an Order that I at the same time don't think should be entered. That's what's bothering me.

MR. SUBIN: Your Honor, may I offer the citation on the authorities cited in Moore, give your Clerk the citation of that paragraph in Moore on the authority the Court would have to treat its interlockatory [sic] Order?

Carol, it's reported in 7 Moore's Federal Practice, Paragraph 60.2; a number of different cases, the *Bonaire Hotel* was one of them.

THE COURT: Well, I know that as far as interlockatory [sic] Order. We're not talking about the interlockatory [sic] Order.

MR. SUBIN: I contend there's no basis under Rule 60 B for doing what's been requested; none whatsoever because its' not a final Order. I think it's purely discretionary.

THE COURT: Well, you filed your Motion NOV within the 10-day period, didn't you?

MR. DeVAULT: I filed my Rule 60 B Motion within 10 days after, yes, sir.

THE COURT: Well, in a sense it's a Motion for Rehearing. You could have filed a Motion within the 10-day period, as I see it, asking me to change my mind on the Motion for Directed or NOV.

MR. SUBIN: But it simply wouldn't have been a 60 B Motion.

THE COURT: No, it would not.

MR. SUBIN: No, no.

THE COURT: I don't know that it has to be a Rule 60 B Motion in order for it to be granted.

MR. SUBIN: Well, that's what I'm saying.

THE COURT: I think it's just a little unusual that it be presented by the winning party to the Motion. But I'll

answer an Order shortly on this and get this thing moving along one way or the other.

MR. DeVAULT: Your Honor, we're not to Rule 60B. That's just the vehicle I saw. Mr. Subin may be correct. I didn't find that avenue, but whatever.

Your Honor knows what we are doing. And it's on the Record. And we want to get it up on the –

THE COURT: I don't see that, since it was timely filed, I don't see that the vehicle make so much difference myself.

MR. DeVAULT: Yes, that's correct,

Judge Young, I heard you, speaking just a few moments ago, say that we have, from my client's side of the case, agreed to the procedure for the limited purposes that it's being offered and reserving objections; is that correct?

THE COURT: No, I said I understood that you were not objecting to his Motion to the entry of a Judgment NOV, that he was offering it, that he was asking for it solely for the purpose of being able to get it to the Appellate Court, but without withdrawing his objections to the merits of it.

Now, whether the Court of Appeals will go along with that sort of procedure is questionable in this Circuit. And back in the 5th Circuit, they disapproved in criminal cases where Motions to Suppress were denied and the Plaintiff would then plead guilty, but with reserving the right to bring up on appeal the merits of the Motion to Suppress. And that's the procedure that's permitted in the State Courts and is not a procedure which is either now or is soon to be permitted by changing the Rule. But my point is that the 5th Circuit was technical on those things.

MR. SUBIN: I only wanted to emphasize for the Record that my statement should not be construed as in any way conceding that we're not entitled to a new trial or that we believe we had an entirely fair trial, so that should the Court of Appeals accept this procedure we will not be precluded should they, should the Court of Appeals reverse the Judgment NOV, we should not be precluded from a new trial.

That's my fundamental purpose.

THE COURT: Well, I would also understand that your Motion is that you would not be precluded from arguing that the NOV was properly granted on merits.

MR. SUBIN: Thank you.

THE COURT: You understand that, Mr. DeVault?

MR. DeVAULT: Yes.

MR. SUBIN: Fine, Your Honor.

THE COURT: Well, if I'm satisfied that this is not some sort of breach of intellectual integrity, I would be inclined to grant it. But I'll grant, I'll enter an Order shortly.

MR. SUBIN: Your Honor, when you do the Order, would you undertake to consider at that time the advisability of incorporating into that Order the December 3rd Order or the one Order granting the new trial so that, or at least in your own mind, we'll eliminate any possibility for confusion by reason of having more than one paper, or if there is more than one paper, that they so refer to each other in such a way there is no lack of clarity.

I know that you're meticulous in all of those and I don't mean to imply otherwise.

THE COURT: All right. If I grant Mr. DeVault's Motion, I'll attempt to do that.

MR. SUBIN: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. DeVAULT: No, Your Honor.

MR. SUBIN: Not today, Your Honor.

MR. DeVAULT: Thank you for Your Honor's time today.

THE COURT: As indicated, if this case were to be retried as some other Judge will try it — I don't like to retry cases. I've sometimes had to when I was all by myself. Now that there's more than one Judge, I don't like to try a case but once.

MR. DeVAULT: Yes, sir. Hopefully that won't be the case.

THE COURT: All right.

MR. DeVAULT: Thank you.

THE COURT: All right.

(Whereupon, the proceedings concluded at 2:15 o'clock p.m.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs. No. 79-598-Orl-Civ-Y

PACCAR, INC., a Delaware corporation,

Defendant.

ORDER

On December 23, 1983 this Court entered an order denying defendant's motion for judgment notwithstanding the verdict and granting defendant's alternative motion for a new trial. Pursuant to Rule 60(b), plaintiffs now move the Court to enter a judgment notwithstanding the verdict in order to permit an immediate appeal. At the hearing on this latest motion defendant's counsel represented that the defendant would not object to a motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

In support of this rather unusual procedure, plaintiffs rely on *National Polymer Products, Inc.* v. *Borg-Warner Corp.*, 660 F.2d 171 (6th Cir. 1981). In *National Polymer Products, supra*, the Court found the jury verdict for the plaintiff to be against the clear weight of the evidence and granted defendant's motion for new trial. Plaintiff filed a

motion under Rule 60 to "correct" the Court's order by entering a judgment notwithstanding the verdict for the defendant. The Court granted the motion for judgment notwithstanding the verdict in favor of the defendant and dismissed the case. On appeal to the Sixth Circuit Court of Appeal, defendant argued that that court was without jurisdiction to entertain the appeal because the plaintiff "consented" to the entry of judgment notwithstanding the verdict. The Court in that case held:

> "The dismissal, though perhaps indirectly and in a very loose sense solicited by National Polymer was not voluntary . . ." 660 F.2d at 177.

Although the Circuit Court found the District Court erred on the merits in dismissing the case, the procedure was approved.

The present posture of the proceedings at bar places this Court in an unusual position: both sides ask for a judgment notwithstanding the verdict but, of course, for different reasons. Furthermore, plaintiffs concede they are in favor of a judgment notwithstanding the verdict solely for the purpose of being able to contest such judgment without the necessity of having a new trial at this time.

In *National Polymer Products, supra,* the Sixth Circuit Court of Appeals relied on *Thomsen* v. *Cayser,* 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed.2d 597 (1917), for approving the procedure noted above. In *Thomsen* v. *Cayser, supra,* the Circuit Court of Appeals for the Second Circuit had determined in that antitrust case that it would be impossible to hold that the record disclosed a combination in unreasonable restraint of trade but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to dismiss and that upon another trial the plaintiffs might be able to produce additional testimony ten-

ding to make out a case and accordingly, the Court of Appeals remanded the case to the trial court for a new trial. However, the plaintiffs had a rehearing, waived any right to a new trial and consented that the case should be disposed of one way or the other. As a result of the rehearing, the Court of Appeals recalled its mandate and reversed the judgment with instructions to enter an order dismissing the complaint. On appeal to the Supreme Court of the United States, that Court held:

> "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory so that they might come to this court without further delay."[1]

243 U.S. at 83, 37 S.Ct. at 358, 61 L.Ed. at 605.

Adopting the reasoning of *Thomsen* v. *Cayser, supra*, and *National Polymer Products, supra*, this Court will grant the motion for judgment notwithstanding the verdict and grant defendant's alternative motion for a new trial. Accordingly, it is

ORDERED that the motion for judgment for the defendant notwithstanding the verdict be and is hereby granted and this case is dismissed with prejudice, and it is further

ORDERED that in the alternative the motion for new trial be and is hereby granted in the event the judgment notwithstanding the verdict be vacated or reversed.

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[1]The Supreme Court proceeded to adjudicate the case on its merits.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of February, 1983.

/s/ George C. Young
Senior United States District Judge

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FILED
ORLANDO, FLA
FEB 24, 1983
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U.S. DISTRICT COURT

M-FILM ROLL #42
Document #1473

James E. DEAS and Peterbilt of Florida,
Inc., a Florida Corporation,
Plaintiffs-Appellants,
v.
PACCAR, INC., a Delaware Corporation,
Defendant-Appellee.

No. 83-3182

United States Court of Appeals,
Eleventh Circuit.
Nov. 14, 1985

Truck dealer brought action against manufacturer for violations of the Federal and Florida Dealer Day in Court Acts when its dealership contract was not renewed. The United States District Court for the Middle District of Florida, George C. Young, District Judge, granted manufacturer's motion for new trial and, subsequently, granted dealer's request to enter judgment notwithstanding verdict to permit immediate apeal. The Court of Appeals, Clark, Circuit Judge held that dealer failed to prove manufacturer violated the Acts.

Affirmed.

1. Federal Courts 596, 765.

Court of Appeals allowed appellant to consent to grant of judgment notwithstanding verdict as vehicle to make judgment final and to bring its appeal, but Court would review only ruling by district court which was initially adverse to appellant, that is, grant of a new trial: j.n.o.v. standard would not be applied but, rather, less strict standard of review used in determining whether

district court erred in granting new trial would be applied. Fed.Rules Civ. Proc. Rule 50(c), 28 U.S.C.A.

2. Federal Courts 825

Standard of review applicable to grant of new trial is generally said to be that of determination of whether district court abused its discretion; however, this general principle is dependent largely upon basis of district court's grant of new trial.

3. Federal Civil Procedure 2331

District court was allowed wide discretion in granting new trial which was not ordered solely because jury verdict was against clear weight of the evidence; it was a case where a combination of the factors, which could have caused jury to reach possible erroneous verdict, led court to conclude that new trial was necessary. Fed.Rules Civ. Proc. Rule 50(c), 28 U.S.C.A.

4. Federal Civil Procedure 2336

In truck dealer's action for violation of the Florida Dealer Day in Court Act, district court did not abuse its discretion in granting new trial due to its prejudicial failure to instruct jury on burden of proof under the Act. West's F.S.A. § 320.60 et seq.

5. Trade Regulation 871.3

Truck dealer failed to sustain its burden of proving that manufacturer discriminated against it in violation of the Federal Dealers' Day in Court Act, 15 U.S.C.A § 1221 et seq.; evidence regarding method of allocating trucks to dealers, causes of allocation system, and effect strikes and similar production delays had on the system was sparse and, as a result, jury could not determine whether

manufacturer purposely deviated from its normal allocation system when it allocated trucks to dealer.

John A. DeVault, III, Jacksonville, Fla., for plaintiffs-appellants.

Eli H. Subin, Orlando, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

CLARK, Circuit Judge:

This is an appeal by James E. Deas (Deas) and Peterbilt of Florida, Inc. (P.O.F.) from an order granting PACCAR, Inc. (PACCAR) a new trial. Deas is the President and sole stockholder of P.O.F., formerly an exclusive Peterbilt truck dealer. PACCAR is the manufacturer of Peterbilt Trucks. One of PACCAR's divisions is Peterbilt Motors Company (Peterbilt).

Deas and P.O.F. filed this action against PACCAR, Inc. for: (1) violation of the Federal and Florida Dealer Day in Court Acts; (2) fraud with respect to the nondisclosure of facts regarding prospective loans, supplies of new trucks for resale, and P.O.F.'s status as a dealer; and (3) tortiously interfering with P.O.F.'s business relationships. P.O.F.'s claims based on the Federal and Florida Acts and Deas' claim of tortious interference with a prospective business relationship were the only claims submitted to the jury.The jury found that PACCAR, through its Peterbilt Motors Company Division, violated the Florida and Federal Acts and tortiously interfered with a prospective business relationship held by Deas.

PACCAR filed a motion for judgment notwithstanding the verdict (J.N.O.V.) and an alternative motion for a new trial. The district court, after a hearing, denied the motion for J.N.O.V. and granted PACCAR's alternative motion for a new trial. In its order, the court stated:

> It is this Court's opinion that the admission of Dr. Westbrook's testimony (the expert who testified on behalf of plaintiff) as support for both liability and damages was in error in that it was completely speculative. Without such evidence the plaintiff could not have prevailed. . . .

Record, Vol. 13 at 3188.

Deas and P.O.F. requested the court to enter a judgment notwithstanding the verdict so that an immediate appeal could be taken. The plaintiffs stated that they could not establish any better case on retrial and that they could not afford a retrial. They thus wanted to win or lose based on the record made at trial. The court granted the motion for judgment notwithstanding the verdict and PACCAR's alternative motion for a new trial. The procedural aspect of this appeal is discussed *infra* in § II.

I. FACTS

Deas and a co-partner purchased a truck dealership in Orlando in 1966. At that time, the company operated under a different name and was not an exclusive Peterbilt distributor.

In 1970, Deas became the president and sole stockholder of the company. With the permission of Peterbilt, Deas changed the dealership name to Peterbilt of Florida and thereafter sold Peterbilt Trucks exclusively.[1] The initial

[1]The contract did not require Deas to sell Peterbilt Trucks exclusively. The evidence demonstrated that several Peterbilt dealers sold other brands.

distributor's contract between Deas and Peterbilt was signed in February, 1971 and could be terminated by either party by giving thirty days notice.

In 1971 and 1972, Peterbilt encouraged Deas to sign a new distributor contract and to expand to other markets in Florida. Although Deas objected to certain provisions of the contract and to the plans for expansion, he eventually signed the new contract and in 1973 embarked on an expansion program which his accountant had advised was not prudent. The contract provided that additional facilities would be necessary when required and did not obligate Peterbilt to lend any financial support to P.O.F.

Deas testified that he believed that PACCAR would provide him with all of the trucks he needed and with financial assistance when he reluctantly agreed to expand. He related that he discussed the expansion efforts with PACCAR's General Manager and General Marketing Manager. They told him that it was necessary for him to expand his operation so the company could achieve greater market penetration. Deas responded that P.O.F. was centrally located, that he did not have the money for the proposed expansion, and that more trucks would be needed. According to Deas, they assured him that he would be able to obtain all of the trucks he needed and that he would receive assistance in financing. *Record,* Vol. 1 at 194. Benny L. Bailey, PACCAR's Eastern Region Credit Manager, corroborated Deas' opinion about obtaining financial assistance during the expansion. Although he also indicated that Deas probably misunderstood the statements of PACCAR's representatives, he testified that Deas informed him that Deas had been offered financial assistance. *Record,* Vol. 24 at 1238.[2]

[2]The correspondence between Deas and the Peterbilt managers demonstrates that financial assistance was discussed frequently. Plaintiff's Exhibits 18, 25, 26, 133, 139.

Bailey convinced Deas to apply for wholesale financing from Associates Finance (Associates).[3] As a result, Deas and Associates entered into an agreement in which Associates extended wholesale financing so that P.O.F. could obtain its inventory. *Record,* Vol. 20 at 220-221. Deas did not receive any direct financial assistance from Peterbilt.

From 1971 to 1974 P.O.F. received outstanding performance awards from Peterbilt. However, P.O.F.'s subsequent financial performance was not as outstanding. P.O.F. had a negative net worth from 1975 to 1978.[4] Its accountant, Carson Eddy, testified that P.O.F.'s financial problems were the result of a lack of operating capital. Eddy also testified that P.O.F.'s accounting procedures were deficient; although, he did not feel they affected P.O.F.'s profits.[5]

Eddy rendered his opinion about the causes of P.O.F.'s financial condition:

> In 1974 and '75, I believe they had some problems with strikes at the factory which caused Mr. Deas not

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[3]Associates had a repurchase agreement with Peterbilt in which Peterbilt would repurchase any new trucks that had to be repossessed because of a dealers default on a wholesale financing. The contract was beneficial to PACCAR and Peterbilt dealers because it induced Associates to furnish wholesale financing to the dealers. It was beneficial to Associates because it provided Associates with an opportunity to provide financing to retail customers. *Record,* Vol. 24 at 1235.

[4]PACCAR's Eastern Region Credit Manager testified that P.O.F. had not had serious cash flow problems prior to this period. *Record,* Vol. 24 at 1244.

[5]During this period P.O.F. also wrote several checks to PACCAR and Associates for which there were insufficient funds in its bank account. It also collected funds for vehicles sold and did not pay Associates.

to have enough trucks available for sale. I think that was during 1970 — I can't recall the exact date — I think it was '73 and '74 was the strike.

Right after that, they went on allocations, I believe, and weren't able — they weren't able to get enough trucks to sell and had too much overhead with all the branches.

. . . .

[B]y using internal capital at the time for expansion, at the time that recession hit, they did not have internal funds available to carry on those operations; and therefore, had to go to outside short-term lending at very high interest rates at that time.

Record, Vol. 23 at 941, 943.

PACCAR's Eastern Region Credit Manager had a similar observation regarding the cause of P.O.F.'s financial problems:

QUESTION: Did you investigate the source of the problem?

ANSWER: Yes.

QUESTION: What did you determine?

ANSWER: That it developed over a period of time beginning with a shortage of trucks to sell in 1975 and subsequently carried into 1976, creating the shortage where he couldn't pay a parts statement on a monthly basis. . . .

Record, Vol. 24 at 1244.

In January, 1975 Deas contacted Joseph Dunn, the General Manager of the Peterbilt Division, because P.O.F.'s distributor's contract was near the date of expiration. On March 20, 1975, Dunn recommended that the contract be renewed for a three year term. *Record,* Vol. 24

at 1208.[6] Dunn left the position of General Manager in August, 1975 and was replaced by Ug Rohr.

When Rohr became General Manager he apparently brought with him a change of philosophy with regard to the renewal of distributor's contracts in general and P.O.F.'s contract in particular.[7] One employee observed that Rohr's policy was to eliminate all dealers who were not selling an adequate amount of trucks and who were having financial problems. *Record,* Vol. 24 at 1251-52. Under Rohr's administration, several memos regarding the Florida market and P.O.F.'s performance were generated. The memos directed employees to check on getting new dealers in Florida; suggested that Peterbilt might need to develop a plan to terminate amicably its relationship with P.O.F.; and advised Rohr to seek legal assistance in order to determine the documentation needed to support a cancellation of P.O.F.'s contract.[8] Deas stated that he was unaware of Peterbilt's concerns regarding P.O.F.'s performance.

Deas testified that he received the three-year renewal contract on February 19, 1976, one year after it had been approved.[9] However, the renewal contract was dated as being signed on December 15, 1975.

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[6]According to Dunn, the only other item to be completed after his approval was the signing of the formal contract by Deas and himself. Dunn did not know why the signing of the contract was delayed.

[7]It appears that Deas was never a "favorite" of Peterbilt. PACCAR and Peterbilt employees testified that he was a "difficult dealer" to get along with and that his facilities were not representative of an exclusive Peterbilt dealer with respect to appearance, design, and size. *See, e.g., Record,* Vol. 24 at 1188; 1211-12; 1232-33.

[8]Plaintiff's Exhibits 71-75.

[9]*Record,* Vol. 21 at 306. Deas' testimony was corroborated by a Dealer Contact Report, which indicated that contact was made with the dealer on February 19 and 20, 1976. Tom Root, who was Southeast Dealer Sales Manager, stated that he delivered the signed Peterbilt three-year contract to Deas.

The 1975 distributor's contract provided that the distributor would "maintain a sales and service organization which will be adequate to develop the potential of his market area . . ." and at "such time as sales show the requirement for additional facilities within the market area, the distributor will be expected to establish outlets in such locations." Plaintiff's Exhibit 68 at 1. The contract also required P.O.F. to invest "working capital and maintain lines of credit necessary to realize the full potential of [its] market area." *Id.* Peterbilt agreed to "use its best efforts to make shipments on or before the dates specified in orders accepted from the Distributor" but did not agree to be responsible "for failure to deliver goods on time or to fill orders where prevented by . . . strike or labor disturbances . . . or if the demand for goods [exceeded Peterbilt's] available supply. . . ." *Id.* at 2.

Presumably, strikes and the increased demand for trucks caused Peterbilt to allocate trucks to its dealers from 1975-76 until 1977-78.[10] Deas was disturbed with his truck quotas because he felt they were insufficient to allow him to operate profitably. Peterbilt's Southeastern Sales Manager, however, testified that the allocation of trucks prevented all of the dealers in his region from obtaining the number of trucks ordered.[11]

Deas testified that in January, 1978 he was forced to close one of his four facilities because he could not obtain

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[10] *Record,* Vol. 24 at 1191, 1199. The record is not entirely clear on the reasons for the allocation system or the exact date upon which the allocation system was instituted. However, the issue of the need to allocate was not in dispute.

[11] *Id.* at 1198.

sufficient equipment to make a profit.[12] Rohr responded to Deas' action by deleting several South Florida counties from Deas' market and by instituting a corresponding reduction of Deas' sales quota.[13] As a result of these actions, P.O.F. sued Peterbilt for the return of its South Florida territory.

In December, 1977 Associates notified Deas of its intention to cancel P.O.F.'s new truck wholesale line of credit because Deas had changed his sales efforts from retail customers (upon which Associates made the bulk of its money) to wholesale customers. Associates extended the date of cancellation to 1978 in order to coincide with the term of P.O.F.'s distributor contract.

It was during this stormy period that P.O.F.'s distributor contract was near the date of its expiration. Because Deas had not obtained alternate financing, Peterbilt conditioned a one-year renewal of the dealership on P.O.F.'s improving its financial condition and obtaining new financing.[14]

As a last attempt to improve P.O.F.'s financial position, Deas entered into negotiations with a Peterbilt dealer named Wendell Doonan.[15] Deas' proposal, which was subject to Peterbilt's approval, was that Doonan would purchase a piece of Deas' property for $440,000 and assume P.O.F.'s Tampa sales territory. Deas informed Rohr of the proposal.

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[12]*Record,* Vol. 21 at 319-20.

[13]Plaintiff's Exhibit 129.

[14]Plaintiff's Exhibit 171.

[15]Deas claims that if its financial position had improved, Associates would have reinstated its wholesale line of credit. PACCAR points out that Associates did not cancel the credit because of Deas' financial condition, but because P.O.F. stopped selling retail accounts.

The deal between Deas and Doonan was never executed, primarily because of a call to Doonan from a PACCAR Vice President advising him not to develop his operations in Tampa.[16] Because P.O.F. did not obtain inventory financing for the one-year term of its proposed renewal, PACCAR did not renew P.O.F.'s contract.[17]

II. THE PROCEDURAL BACKGROUND

This case comes to us on appeal with an unusual procedural history. As mentioned previously, the district court initially granted PACCAR's motion for a new trial and denied its motion for judgment notwithstanding the verdict. Plaintiffs then filed a Rule 60 motion, asking the court to enter a judgment notwithstanding the verdict so they could take an immediate appeal. PACCAR agreed to the procedure. Although the court recognized that the judgment notwithstanding the verdict was a harsh remedy under the circumstances, it granted the motion and the alternate motion for a new trial.

The procedural history in *National Polymer Products, Inc. v. Borg-Warner Corporation,* 660 F.2d 171 (6th

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[16] Doonan discussed the conversation:

> Joe called me one day and told me he wished I'd back off, that he felt like I had all the eggs in one basket and he felt like I'd be a lot better off – he called me as a personal friend, not as Joe Dunn, Manager of Peterbilt/Kenworth.
> He said, "Hey, me and you is friends, have been friends for a long time. I just wish you would back off. You're a very valuable man in Great Bend, Kansas, but you could get yourself spread too thin and get yourself in trouble in Tampa, Florida." That probably was my turning point on thinking about going to Tampa.

Record, Vol. 24 at 1409.

[17] Plaintiff's Exhibit 190.

Cir.1981) is almost identical to this case. In *National Polymer,* the defendant moved for a judgment notwithstanding the verdict, a new trial, or in the alternative a remittitur. The court considered the motion for judgment notwithstanding the verdict to present a close question; however, it ultimately granted the motion for a new trial. National Polymer subsequently filed a Rule 60 motion asking the court to correct its memorandum decision by entering, among other things, a judgment notwithstanding the verdict. National Polymer admitted that its reason for seeking a judgment notwithstanding the verdict was that it wanted to obtain immediate appellate review of the trial court's decision.

Citing *Thomsen v. Cayser,* 243 U.S. 66, 83, 37 S.Ct. 353, 358, 61 L.Ed. 597 (1917), the court of appeals found that the procedure utilized was permissible.

> . . . "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay." . . .
>
> Here, the lower court order granting a new trial was interlocutory and unappealable. National Polymer persuaded the trial court to change its verdict to reflect its reasoning. That alteration produced a final judgment, a dismissal, allowing this appeal to be maintained.

Id. at 177 (citations omitted).

We accept jurisdiction in this case since the district court entered a J.N.O.V. and ordered a new trial, the J.N.O.V. having been solicited by appellant to secure an appeal. We do not fully accept the Sixth Circuit's method of reviewing the trial record and dispositive orders. In *National*

Polymer, supra, that Circuit reviewed the case using two standards of review. When the standard applicable to a J.N.O.V. was applied, the court found the district court erred; yet, when it applied the standard applicable to the grant of a new trial, it found that the district court did not err and returned the case for another trial. The result was that the Circuit permitted appellant to confer appellate jurisdiction upon the court pursuant to its consent that the district court change its denial of a J.N.O.V. to a grant of a J.N.O.V.

The scenario is the same here. In their oral argument, in support of their motion to enter judgment for the defendant on both grounds, counsel stated:

> We have represented in our Motion that we're satisfied with the Brief we've presented. That because of the circumstances of these Plaintiffs, we're unable to go forward with the expense of a new trial. We further stated that if we were to go on with a new trial, we would present the same testimony upon which we relied at the initial case and including that of Dr. Westbrook, which if this Court's ruling was correct and this Court or any other Court is consistent with the Court's ruling, would be required to grant a directed verdict.
>
> We submit then, Your Honor, that in the proper administration of justice, it is far better for this Court and for the parties to have this matter finally and conclusively as determined by the Court of Appeals on now a full Record, after a full hearing, argument and a Jury verdict.

Record, Vol. 16 at 6-7.

[1] Normally the grant of a new trial is an interlocutory order, not subject to appellate review unless coupled with the grant of a J.N.O.V. as provided in Fed.R.Civ.P. 50(c).

While we accept jurisdiction of this appeal, we refuse to apply the J.N.O.V. standard but instead apply the less strict standard of review used in determining whether the district court erred in granting the new trial. In other words, we allow the appellant to consent to the grant of the J.N.O.V. as a vehicle to make the judgment final and to reach this court. However, we review only the ruling by the district court which was initially adverse to the plaintiff/appellant below, that is, the grant of a new trial. Fairness to both parties and the district court dictate this method of review.

[2] The standard of review applicable to the grant of a new trial is generally said to be that of a determination of whether the district court abused its discretion. However, this general principle is dependent largely upon the basis of the district court's grant of the new trial. *See Rabun v. Kimberly-Clark Corp.,* 678 F.2d 1053, 1060 (11th Cir. 1982), and *Williams v. City of Valdosta,* 689 F.2d 964, 972 (11th Cir. 1982). Where the grant is on the ground that the verdict is against the weight of the evidence, we exercise close scrutiny out of deference to the right of a litigant to have a jury determination of the facts. *Massey v. Gulf Oil Corp.,* 508 F.2d 92, 94-5 (5th Cir. 1975). We have said that there are some gradations in the strictness of our review in those instances where the issues are highly complex, being more strict in our review when the issues are simple and the outcome largely dependent upon the credibility of witnesses. *See Williams v. City of Valdosta, supra,* at 974.

Additionally, there is a distinction between a new trial awarded because the verdict was against the weight of the evidence and one awarded for other reasons. As adopted in *O'Neil v. W.R. Grace & Co.,* 410 F.2d 906 (5th Cir.1969):

New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, (2), supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. . . . It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. . . .

Id. at 914 (quoting from *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir. 1960), *cert. denied,* 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960)).

In this case it is clear that the trial court granted a new trial for several reasons. In response to a suggestion that the new trial had been granted solely on evidentiary grounds the district court responded:

> In the first place, I think the record is clear that I granted a motion for a new trial for a number of reasons—

Record, Vol. 16 at 14-15; *see also Record,* Vol. 17 at 36-45 (various reasons for grant of new trial); *Record,* Vol. 13 at 3188 (written order).

The court pointed out that *International Harvester Company v. Calvin,* 353 So.2d 144 (Fla.Dist.Ct.App. 1977), required an additional instruction to the effect that "if there was a good reason for the nonrenewal that then even if there were other grounds which were not priority that the valid reason would have precluded recovery under the Florida Act." *Record,* Vol. 17 at 43. The court indicated that it should have given an instruction on the mitigation of damages requirement. However, it did not base its ruling on this factor alone.

In addition, the court found that several essential factors were not clearly shown by either party. Some of these factors were: (1) the total number of trucks that were produced and available to P.O.F.; (2) the reasons for the quota system and whether Peterbilt deliberately allocated less trucks than it could have allocated under the system; and (3) the effect that the strikes had on deliveries and allocations. The court was also concerned that neither party had presented sufficient evidence with respect to the amount of profits that could have been generated or lost in the Fort Lauderdale market that was taken from P.O.F.

The court found several deficiencies in both of the experts' testimony with respect to discrimination in delivery

both as to the number of trucks allocated and the timing of deliveries.[18] The court was concerned that the appellant's expert chose to select comparative dealers based on whether the expert thought they received "favored treatment" and that the expert had selected a dealer that was not in the same region as P.O.F.[19]

The court also pointed out that the raw figures indicated that P.O.F. received trucks faster than other dealers. The court concluded that when the appellant's expert added

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[18]The court stated:

> On this point [discrimination] both the evidence of the Plaintiff and the evidence of the Defendant were, I think – was considerably deficient. . . . It was never shown by either side on this discrimination point of how many trucks were being produced and how many actually were available to come to Peterbilt of Florida and whether Peterbilt Motor Company was deliberately allocating 125 trucks when they could have allocated 250, for example. The Plaintiff didn't show that and the Defendant didn't show that.

Record, Vol. 17 at 41-42.

The court also criticized PACCAR's expert based on his past connections with PACCAR. Apparently, some of the divisions of PACCAR, such as Peterbilt, were major customers of the expert witness and provided the witness with a substantial amount of income.

[19]On the method of selecting comparative dealers, the court concluded:

> Of all of the numerous dealers instead of picking them at random he just picked four that he suspected got favor [sic] treatment which might show that those four got favor [sic] treatment but by comparing Peterbilt of Florida to them would not necessarily come up with the – could not come up with the conclusion that Peterbilt of Florida was discriminated against as to the average dealer but only that it was discriminated against as to a favored dealer. One of these dealers was not in the southeast section.

Record, Vol. 17 at 41.

computations there was a difference in delivery that was so insignificant that it became unimportant.

On the interference with a prospective business relationship claim, the court found that if the property had been sold to Doonan, the profits generated would have been insufficient to pay the debts owed and that there would not have been any money left to place in the business. The court felt it was a distortion of the evidence to advance a contrary contention.

[3] After reviewing the thrust of the district court's order, it is obvious that the new trial was not ordered solely because the jury verdict was against the clear weight of the evidence. This is a case where a combination of factors, which could have caused the jury to reach a possible erroneous verdict, led the court to conclude that a new trial was necessary. Under these circumstances, the district court was allowed wide discretion in granting the new trial. *See O'Neil v. W.R. Grace & Co.*, 410 F.2d 908, 914 (5th Cir.1969).

III. THE JURY INSTRUCTIONS UNDER THE FLORIDA ACT

We now address the district court's failure to instruct the jury on the burden of proof under the Florida Act in accordance with *International Harvester Company v. Calvin*, 353 So.2d 144 (Fla.Dist.Ct.App.1977). We have recently had the opportunity to examine the Florida Act in *Dick Winning Chrysler v. Chrysler Motors Corporation*, 750 F.2d 895 (11th Cir.1985). In *Dick Winning* we discussed *International Harvester:*

> In *International Harvester Co.*, a truck dealer protested a manufacturer's cancellation of its franchise agreement. On review, the Florida appellate court

> held that the dealer had the initial burden of establishing that the manufacturer's decision to terminate the franchise agreement was unfair. The court further stated that the burden, following a prima facie showing of bad faith, shifts to the manufacturer, to show by a preponderance of the evidence that it would have reached the same decision in the absence of the alleged bad faith. *International Harvester Co.,* 353 So.2d at 148 (citing *Mount Healthy City Board of Education v. Doyle,* 429 U.S 274, 286, 97 S.Ct. 568 [575], 50 L.Ed.2d 471 (1977)).
>
> After evaluating the substantial uncontroverted objective data produced by the parties, the *International Harvester* court concluded that any prima facie showing of unfairness by the dealer, Rich Motors, was clearly rebutted by the objective data submitted by the manufacturer. The court concluded that International Harvester's decision to terminate Rich Motors was in accordance with the parties' franchise agreement. Likewise, we find that Chrysler Motors' decision to terminate Winning Chrysler was in accordance with the parties' franchise agreement, and Winning Chrysler has failed to prove that Chrysler Motors imposed any "unfairness" upon the dealership.

Id. at 898-99. An examination of the district court's instruction regarding the Florida Act demonstrates that the jury was not instructed on PACCAR's burden of proof as set forth in *International Harvester. See Record,* Vol. 29 at 2770-76. Thus, there is no assurance that the jury applied the appropriate burden of proof. Because PACCAR did not admit the appellants' prima facie case and thus assume the burden of proof, it was entitled to have the jury charged on this critical aspect of its case.

"The question on appeal is not whether an instruction was faultless in every respect, but whether the jury, con-

sidering the instruction as a whole was misled. . . . Thus, only in those cases where the reviewing court has a substantial doubt whether the jury was fairly guided in its deliberations should the judgment be disturbed." *Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Company,* 615 F.2d 1372, 1390 n. 16 (5th Cir.1980), *cert. denied,* 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980) (citations omitted).

The appellants essentially argue that the failure to instruct on the burden of proof was harmless.[20] We disagree. The failure to instruct on PACCAR's burden of proof was too central to be harmless. To hold otherwise "would be to abrogate the district court's duty to instruct the jury accurately." *Id.* at 1391 n. 16.

[4] We have ordered a new trial where "the charge given on burden of proof was in error and was prejudicial to the appellant." *Phillips v. State Farm Mutual Automobile Insurance Company,* 437 F.2d 365, 368 (5th Cir.1971). In this case, the failure to instruct the jury on the burden of proof was prejudicial. Moreover, we have substantial doubts that the jury was completely guided during its deliberations. Thus, we hold that the district court did not abuse its discretion when it granted a new trial due to its failure to instruct the jury on the burden of proof under the Florida Act as set forth in *International Harvester.*

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[20]The appellants urge that the failure to instruct was favorable to PACCAR "given the instruction at the beginning of trial that PACCAR could not be liable if it had "just cause" for 'failing to renew or refusing to renew' POF's contract . . . [and] the general instruction on burden of proof. . . ." *Appellant's Reply Brief* at 23-24. It is further contended that the charge did not mislead the jury and that the jury understood the issues it was to apply in arriving at its decision.

IV. THE FEDERAL DEALERS' DAY IN COURT ACT

Our independent examination of the record has led us to conclude that the evidence before the jury on the discrimination issue was deficient. One obvious problem with the evidence was the failure of the appellants' expert to present sufficient facts demonstrating that the dealers, with whom P.O.F.'s deliveries were compared, were similar to P.O.F.

The appellants' expert selected dealers whom the expert thought received "favored treatment" and failed to restrict his selection to dealers located in the southeastern region.[21] In addition, the expert examined some of the more profitable Peterbilt dealers.[22]

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[21]PACCAR's expert stated that the southeast region consisted of Alabama, Georgia, Florida, Mississippi, Kentucky, South Carolina North Carolina, West Virginia, and Virginia. The appellants' expert stated that he examined the southeast region as defined by Peterbilt. However, it is undisputed that one of the dealers was located in Massachusetts. *Record,* Vol. 25 at 1594.

[22]A cursory examination of the 1977 dealer rankings with respect to the sales of parts and trucks illustrates that the dealers selected may not have been sufficiently comparable. Comparative dealers are underlined on the ranking charts which are reprinted below.

Southeast Region
Performance Review

Trucks

1. Peterbilt of Knoxville	399%
2. Ed Wright	200%
3. Easom Truck Sales	175%
4. *Nalley Motor Trucks*	*149%*
5. Peterbilt of Louisiana	129%
5. *Peterbilt of Nashville*	*129%*
6. Trucks, Inc.	116%
7. *Peterbilt Southern*	*115%*
8. Peterbilt of Misssissipi	114%
9. *Peterbilt of Florida*	*106%*

Although evidence of another dealer's performance is admissible and helpful in these cases, we cannot hold that a litigant can select a dealer without regard to the dealer's geographic location, size, product mix, and market potential merely because the dealer is suspected of receiving "favored treatment."[23] *See Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation in U.S.A.*, 533 F.2d 510, 512 (10th Cir.1976) (dealer who contended that it had been dis-

10. Dunham GMC	89%
11. Tri-State	82%
12. Fitzgerald	73%
13. Dickerson GMC	32%
14. West Virginia Trucks	13%
REGION TOTAL	158%

Parts

1. Trucks, Inc.	132%
2. *Peterbilt of Nashville*	*129%*
3. *Peterbilt Southern*	*119%*
4. Peterbilt of Knoxville	116%
5. *Nalley*	*111%*
6. Easom	102%
7. Peterbilt of Louisiana	97%
8. Ed Wright Trucks	90%
9. *Peterbilt of Florida*	*73%*
10. Dunham GMC	70%
11. Dickerson GMC	50%
12. Peterbilt of Mississippi	43%
13. Key GMC – Mobile	39%
14. Fitzgerald	37%
15. Tri-State	20%
16. West Virginia Trucks	19%
REGION TOTAL	93%

Plaintiff's Exhibit 314 (emphasis added).

[23]By no means do we hold that all of these factors must be proven before a dealer can be found to be comparable. However, objective factors should be utilized when an expert selects comparative dealers. The factors mentioned help assure that objective measures are present during the selection process.

criminated against by the distribution and allocation of automobiles selected comparative dealers that were geographically close): *cf. Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814, 821 n. 8 (1st Cir.1983), *cert. denied* ____ U.S. ____, 104 S.Ct. 241, 78 L.Ed.2d 231 (1983) (In response to an argument that there was no showing that the dealerships were sufficiently similiar for the comparison to be legitimate, the court noted that it was not specifically contended "that the dealerships were geographically so distant as to make them incomparable, a possibility not necessarily apparent."); *Farmington Dowel Products v. Forster Mfg. Co., Inc.*, 421 F.2d 61, 82 n. 48 (1st Cir.1970) (District court in antitrust case correctly concluded that two businesses were not sufficiently comparable based on an examination of the products manufactured, sales and distribution system, capitalization, sales and profits, and customer groups.).

[5] We are unable to conclude that the appellants compared P.O.F. to similar dealers. However, there are other factors that support the district court's award of a new trial. Our review of the record demonstrates that the evidence regarding the method of allocating trucks to dealers, the causes of the allocation system, and the effect strikes and similar production delays had on the system was sparse. Although some of these factors were briefly discussed by witnesses, the jury could not have had a clear understanding of how the normal allocation system operated. As a result, the jury could not determine whether Peterbilt purposely deviated from its normal allocation system when it allocated trucks to P.O.F.

One court has established a three-part test for determining whether a manufacturer has failed to make products available to a dealer. First, the plaintiff must prove that it

actually ordered more vehicles than it received.[24] Second, it must be shown "that the particular model vehicles ordered, but not supplied, were available for delivery, *i.e.*, there was no product shortage at the time, or if there existed a period of product shortage such as was customary in the business during the months of new model introduction . . . that [the manufacturer] failed to allocate vehicles in a fair and reasonable manner." *Cecil Corley Motor Company v. General Motors Corporation,* 380 F.Supp. 819, 835 (M.D.Tenn.1974). Third, it must be demonstrated that the manufacturer failed to make such vehicles available for the reasonable requirements of the dealer's area of sales responsibility. *Id.*

It is the second factor of the well reasoned test set forth in *Cecil Corley* that has not been developed in this case. The absence of this critical evidence made it impossible for the jury to accurately determine whether Peterbilt had acted in bad faith when it failed to supply P.O.F. with the trucks it ordered.

As the district court properly pointed out, the fact that P.O.F. failed to obtain financing, which was a valid contractual requirement, is undisputed. The only evidence regarding discrimination was that presented by both of the experts. If the experts' evidence were omitted, the remaining evidence that Peterbilt had begun to etablish a file on P.O.F. in order to amicably terminate P.O.F. would be insufficient to demonstrate a lack of good faith. As stated in *Woodward v. General Motors Corporation,* 298 F.2d 121 (5th Cir.1962), the federal act does not " 'curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.' " *Id.* at 128.

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[24]The fact that P.O.F. did not receive all of the trucks ordered is clear from the record.

Moreover, we have recently held that a dealer was properly terminated for failure to abide by the terms of its franchise agreement. *See Dick Winning Chrysler-Plymouth v. Chrysler Motors Corporation,* 750 F.2d 895, 899 (11th Cir. 1985).

V. CONCLUSION

The district court did not abuse its discretion in granting a new trial. We have tried faithfully to review the facts and the law in reaching this conclusion. Plaintiffs' suit was based essentially on the Florida and Federal Dealer Acts, which require good faith on the part of a motor vehicle manufacturer in terminating or not renewing a dealership contract. In this case PACCAR did not renew basically because P.O.F. could not provide floor plan financing. P.O.F. attempted to show that it lost its financing because of PACCAR's bad faith dealings. P.O.F.'s evidence was speculative, both substantively and as to causation. While P.O.F. increased its sales considerably in the early '70's, it was never sufficiently capitalized according to P.O.F.'s own accountant. P.O.F.'s expert described the 1975-1976 recession as particularly severe in Florida in regard to the sale of trucks. P.O.F.'s troubles began at that time. The district court's assessment of the evidence was correct when it held that the evidence that PACCAR discriminated against P.O.F. was inherently speculative, and that P.O.F.'s financial difficulties could not be attributed to this speculative discrimination.

The appellant was entitled to a new trial but waived that right to obtain an immediate review of the jury's verdict. Since we hold that the appellant was not entitled to a judgment on the jury verdict, the district court was correct in entering a judgment notwithstanding the verdict even

though the court initially denied the defendant's motion. The judgment notwithstanding the verdict is AFFIRMED.